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MICHAEL RODAK,

No. 72-1475

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA,

Petitioner,

vs.

JACK ROBERTS, et al.,

Respondents.

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INDEX

PAGE

Opinion Below 1
Jurisdiction 2
Question Presented 2
Statutes Involved 2
Statement 3
Argument 4
Conclusion 9

AUTHORITIES CITED

Cases

United States v. Becker, 461 F.2d 230 (2nd Cir., 1972) 4

United States v. Giordano, 469 F.2d 522 (4th Cir., 1972) 4, 5

United States v. Pisacano, 459 F.2d 259, 264 (2nd Cir., 1972) 4, 5

United States v. Tocarile, 340 F.Supp. 1033 (D. Md., 1972) 7

Statutes

18 U.S.C. § 245(a)(1) 8, 9

18 U.S.C. § 1952 3

PAGE

18 U.S.C. § 1955 3
18 U.S.C. § 2510 7
18 U.S.C. § 2514 8
18 U.S.C. § 2516 ..... 2, 3, 7, 8
18 U.S.C. § 2516(1) 2, 5, 6
18 U.S.C. § 2518(1)(a) 2
28 U.S.C. § 503 6
28 U.S.C. § 506 6
28 U.S.C. § 510 8

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The Respondents, William G. Jackson and Henry Floyd Box, hereby file their memorandum in opposition to a petition for writ of certiorari.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported but is reproduced in Appendix A of the Government's petition for writ of certiorari at Page 11.

JURISDICTION

The jurisdiction of the court is set forth in the Government's petition for writ of certiorari.

QUESTION PRESENTED

Whether the authorizations for applications and the applications for court orders to intercept certain telephone conversations complied with 18 U.S.C. §2516?

STATUTES INVOLVED

18 U.S.C. 2516(1) provides, in pertinent part:

> "(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communication * * *."

Title 18 U.S.C., Section 2518(1)(a) requires:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following performance:
>
> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;".

STATEMENT

The defendants in this case were indicted for conducting an illegal gambling business in violation of 18 U.S.C. §1955 and making interstate telephone calls in violation of 18 U.S.C. §1952. In each case, the defendants filed motions to suppress evidence obtained by wire interceptions under court orders. Those motions challenged the procedures by which the government processed the applications within the Department of Justice and the applications to the court for the interceptions. The basis of those challenges was the failure of the government to adhere to the statutory guidelines of 18 U.S.C. §2516. The District Court sustained the motions to suppress and the Seventh Circuit affirmed. (Appendix A, Government's Petition For A Writ of Certiorari, P. 11).

ARGUMENT

The government in its petition for a writ of certiorari points to the similarity of the issues in this case and *United States* v. *Giordano,* No. 72-1057, certiorari granted March 26, 1973. In doing so it relies on the reasoning set forth in the *Giordano* petition which alleges a conflict among the circuits.[1] We respectfully submit that no such conflict exists since the cases involved are factually distinguishable.

In making the argument concerning the alleged conflict in the circuits the government relies on the Second Circuit's opinions in *United States* v. *Pisacano,* 459 F.2d 259 (2nd Cir., 1972) petition for certiorari pending, No. 71-1410 and *United States* v. *Becker,* 461 F.2d 230 (2nd Cir., 1972) petition for certiorari pending, No. 72-158. The facts of those cases distinguish them from the instant case. The issue presented in *Pisacano,* as reflected by the government's brief in the Second Circuit and that court's opinion, was whether the defendants should be allowed to withdraw their pleas of guilty. In deciding that issue, the Court stated:

> "When the pleas were taken, no Court had yet determined that any defect existed in the authorization procedures, and, now that the procedures have been explained better than the Government did in Robinson *we are not at all sure that there was.*" (Emphasis added.)
>
> *United States* v. *Pisacano,* 459 F.2d 259, 264 (2nd Cir., 1972).

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[1] See footnote three (3), page 5 of government's Petition for A Writ of Certiorari.

Although the Second Circuit of course considered the question of the authorization procedure of 18 U.S.C. §2516(1), it did not hold as a matter of law that the alleged authorizations in that case complied with Title 18 U.S.C. §2516(1), but limited their decision to the facts in that case. In fact, the Court only found that the affidavits concerning the authorization in *Pisacano* presented "a rather different picture from those before the Fifth Circuit in *Robinson.*" The Court's attention is directed to Footnote 5 in *United States* v. *Pisacano,* 459 F.2d 258, 264, (2nd Cir., 1972), petition for a writ of certiorari granted, wherein the Court stated, "having concluded that the Justice Department procedures were very likely consistent with the mandate of §2516(1) . . .", an indication that the authorization procedure was not dispositive of the case.

The situation in the instant case is quite different from that in *Pisacano.* In the instant case none of the authorizations were approved by the Attorney General or any specially designated Assistant Attorney General. Unlike *Pisacano* where two of the three authorizations were personally approved by the Attorney General, the authorizations in this case did not receive the attention of any of the individuals specified in 18 U.S.C. §2516(1). Also, none of the defendants in this case pleaded guilty. Although the Seventh Circuit adopted the reasoning of Judge Sobeloff in *Giordano,* 469 F.2d 522 (4th Cir., 1972) petition for certiorari granted, No. 72-1057, the opinion noted there were no authorizations by any of the individuals specified in the statute.

The Government argues that the Congressional purpose in requiring the authorization of the Attorney General (or an Assistant Attorney General specially designated by him) was not regarded as the safeguard for the privacy of citizens, but that that responsibility was placed in the neutral and detached authority of a Federal judge. This

statement and argument belies Congress's obvious intent to install a dual system of protection, namely the Judiciary *and the political process.* Each of the individuals statutorily authorized to approve an application under Title 18, §2516(1) are subject to that political process by Title 28 U.S.C. §503 and §506. Those Sections provide that the Attorney General and Assistant Attorney Generals are to be appointed by the President "by and with the advice and consent of the Senate". Thus, the Senate of the United States may continually insure that those individuals occupying those offices are individuals qualified in both intelligence and judgment to exercise the authority granted by Congress under Title 18 U.S.C. §2516(1). This purpose was obviously frustrated by the cavalier and insensitive procedure instituted by the Department of Justice in the procedure outlined in this case. This is evident by the Government's presumptuous statement that the Executive Assistant Sol Lindenbaum is the alter ego of the Attorney General who made "operative" wiretap decisions. If this individual was to occupy a position of such importance and judgment then the statutory requirement concerning the Department of Justice must be amended by Congress to require that he be appointed to that position "by and with the advice and consent of the Senate". Absent such an amendment, the statutes (T. 18 U.S.C. 2515(1) and T. 28 U.S.C. sections 503 and 506) place that responsibility in nine Assistant Attorney Generals and the language of 2516(1) should not be read to authorize someone other than those individuals identified in the statute to act. Congress made a conscious change in the language of the statute to confine the power to authorize an application instead of permitting any officer of the Department of

Justice or any United States Attorney designated by the Attorney General to authorize an application to the Court. Compare 87th Congress 1st Session S.1495 with the present text of the statute. *U. S.* v. *Tocarle,* 340 F.Supp. 1033 (D. Maryland, 1972).

If Congress sought to exercise political supervision over the wiretapping activities of the Attorney General and had questioned the Attorney General about his wiretap policies in this case, he would have been unable to answer the inquiries because he exercised no discretion in the case. Even if Mr. Lindenbaum knew what the Attorney General would do in the case, that knowledge does not transform Mr. Lindenbaum into the Attorney General. Furthermore, what was "operative" today may not be "operative" tomorrow.

If congress had intended that the Attorney General be allowed to delegate the power and responsibility to authorize wiretap applications then they would not have specifically limited the authorization to the "Attorney General of any Assistant Attorney General specially designated by the Attorney General." 18 U.S.C. §2516. Section 510 existed at the time the Omnibus Crime Control Act was passed. Rather than treating the words "Assistant Attorney General" in 18 U.S.C. 2516 as surplusage, that language should be given meaning, and the authority to approve wiretap applications should be limited to the officers specified in the statute.

The Government argues that the Attorney General's power to delegate his powers to authorize wiretap applications should be inferred from a reading of 18 U.S.C., Section 2510. The Government argues that the words "Attorney General" as used in another part of the Omni-

bus Crime Control Act—Title 18 U.S.C. Section 2514—relating to immunity has been held to permit any officer, employee, or agency of the Department of Justice to approve an application for immunity to a witness. However, 18 U.S.C., Section 2514 uses the words "Attorney General" without additional language to indi ate what Justice Department officers, if any, would be permitted to exercise that authority. Since the statute is silent on such a limitation or expansion of the Attorney General's powers, it is reasonable to conclude that anyone authorized by Title 28 U.S.C. Section 510 to act on behalf of the Attorney General would be permitted to approve an application for immunity. Such a construction is consistent with the statutory scheme outlined in the immunity statute where the initial determination to grant the witnesses immunity is made by a United States Attorney and that the determination is then subject to approval by the Attorney General. The need for these safeguards concerning the granting of immunity does not appear from the legislative history and the individual decisions to grant or withhold immunity rest largely in United States Attorneys scattered in Districts throughout the country. Under such a statutory scheme the personal attention of the Attorney General is not required. The analogy between the language in 18 U.S.C. Section 2514 and Section 2516 does not withstand close examination.

The Government also argues that Congress could have used express language to indicate that the function of the Attorney General may not be delegated citing Title 18 U.S.C. Section 245(a) (1). The pertinent part of that statute requires "the Attorney General or deputy Attorney General" to make a certification before a civil

rights prosecution is undertaken. The statute provides "which function of certification may not be delegated." (Govt. Br. p. 12; T. 18 U.S.C. Sec. 245(a) (1)).

18 U.S.C. Section 245(a) (1) purports to confine the exercise of prosecutorial discretion to the Attorney General or a deputy Attorney General. In the absence of such a limitation, any United States Attorney may, and normally would, exercise the prosecutorial discretion which has historically been placed in him. The language identifying two officers in the Justice Department (the Attorney General or the Deputy Attorney General) would not have been sufficient to limit this historical function. The express language was needed to place the prosecutorial discretion, previously held by local prosecutors, in the Attorney General or the Deputy Attorney General. On the other hand, the authority to initiate wiretaps was not previously exercised by any federal officers before the enactment of the Omnibus Crime Control Act.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN POWERS CROWLEY
Attorney for Respondents